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No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

LAWNDALE MEDICAL SUPPLY, INC., and
STANLEY KALES,

Petitioners,

-vs-

DEPARTMENT OF REGISTRATION AND
EDUCATION OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT.

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QUESTION PRESENTED

Whether a State statute regulating the practice of pharmacy offends constitutional due process as impermissably vague and arbitrary in permitting revocation of a pharmacist's license on a finding of guilt of "gross immorality", absent any clear, objective or reasonable definition of that phrase?

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REFERENCE TO REPORTS

The Opinion of the Appellate Court of Illinois, First District, was not reported and is in the form of an "ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23".* The order of the

*/ Under the Rules of Appellate Procedure of the Supreme Court of Illinois, in certain circumstances, decisions of the Court are not published and may not be cited as precedent.

is appended hereto as App. I. The order of the Supreme Court of Illinois denying PETITION FOR LEAVE TO APPEAL appears as App. II.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, was entered on June 25, 1986. The PETITION FOR LEAVE TO APPEAL was denied by the Supreme Court of Illinois on October 2, 1986. This PETITION FOR WRIT OF CERTIORARI was timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 USC, §1257(3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat. 929, as amended, 28 USC §1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> > (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948 c 646, 62 Stat. 929.

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STATUTES AND CONSTITUTION INVOLVED

Ill. Rev. Stat. 1979, ch. 111, sec. 4019:

4019. Refusal to issue or suspension or revocation of license or certificate

§ 7.6. Refuse to issue or renew, or revoke or suspend, any license or certificate of registration issued under the provisions of this Act or of any prior Act of this State when such registration is satisfactorily shown to have been obtained by fraudulent means, or when the applicant for or holder of such license or certificate has been convicted in this or any other state of any crime which is a felony under the laws of this state or convicted of a felony in a federal court, or is found to be guilty of gross immorality, or is found by the Department to have engaged in fee-splitting as described in Section 10-1 of this Act,[1] or is found to have wilfully violated any of the rules and regulations promulgated for the administration of this Act, or to be addicted to drugs to such a degree as to render him unfit to practice pharmacy in this state.

A license may also be revoked or suspended for any of the following reasons:

(1) Wilfully making or filing false records or reports in the practice of pharmacy, including, but not limited to false records to support claims against the medical assistance program of the Department of Public Aid under the Public Aid Code.[2]

(2) Gross and willful overcharging for professional services including filing false statements for collection of fees for which services are not rendered, including, but not limited to, filing false statements for collection of monies for services not rendered from the medical assistance program of the Department of Public Aid under the Public Aid Code.

Amended by P.A. 80-1425, § 4, eff. Jan. 1, 1979.

[1] Paragraph 4012 of this chapter.
[2] Chapter 23, ¶ 1-1 et seq.

Rule VII of the Rules and Regulations promulgated by the Department of Education and Registration for the administration of the

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Pharmacy Practice Act defines "Gross Immorality":

> 'Gross Immorality'...means and includes any act or practice inimical to the public health, safety and welfare as measured by the standards of the Board of Pharmacy.

USCA Const. Amend. XIV:

> No State...shall...deprive any person of life, liberty, or property, without due process of law;...

STATEMENT OF FACTS

Nature of the Case:

The Illinois Department of Registration and Education, a State agency authorized to administer the state Pharmacy Practice Act, filed an administrative complaint against Petitioners to revoke their separate and individual pharmacy licenses. After hearings conducted by the State Board of Pharmacy, the Director of the Department adopted the findings and recommendations of the Board and revoked Petitioners' licenses.

Upon administrative review, the Circuit Court of Illinois confirmed the findings and

decision of the Appellate Court. The Appellate Court of Illinois, First District, affirmed the Circuit Court's judgment. (App. I, p. 16). At the earliest opportunity, Petitioners challenged the constitutionality of the provision of the Pharmacy Practice Act which authozies suspension or revocation of a license if the licenseholder is *"found to be guilty of gross immorality."* Petitioners also challenged Rule VII of the Rules and Regulations promulgated by the Department which purported to contain the definition of "Gross Immorality" (set forth supra, p. 4.

The charges and the proof:

In July 1982 the Department charged the corporate and individual pharmacists with improper record keeping of drugs and dispensing certain controlled substances.

With respect to the charge of improper record keeping, the complaint alleged that during a certain one-year period the pharmacy purchased 301,000 tables of Tripelennamine-50 and disposed of only 1,000 tablets; that no

Tripelennamine-50 tablets were in inventory at time of the Department's audit; that there was an unexplained shortage of 300,000 tablets.

As to the charge of dispensing of controlled substances, Petitioners were charged with refilling prescriptions for controlled substances without authorization from the medical prescriber during the audit period. The prescriptions were primarily for the controlled substance cough preparation of Dimetane C.C. Ambenyl, Tylenol with codeine, and Hycodan.

The testimony concerning Tripelennamine:

Tripelennamine is an antihistamine preparation. As a "legend drug" it could not be sold over the counter without a prescription by a licensed practitioner. (R. C 121).

Tripelennamine is not a controlled substance and the Physician's Desk Reference entry on Tripelennamine Hydrochloride makes no reference to abuse of that product. (R. C. 157-158). There are no legal restrictions on the amount of Tripelennamine a pharmacy is permitted to

purchase. (R. C 172).

The audit revealed that the Lawndale Pharmacy was unable to account for some 300,000 Tripelennamine tablets which had been shipped to it by various suppliers. The Drug Compliance Coordinator for the Department testified that the rules under the Pharmacy Practice Act require that a pharmacist be responsible for record-keeping and must be able to account for every legend drug purchase. (R. C 141-142).

It was stipulated that the pharmacy had no records of disposition of the Tripelennamine tablets. (R. C 202-203).

Dr. Ralph W. Morris, testifying for petitioners, is a Professor of Pharmacology and an Adjunct Professor of Education at the University of Illinois. (R. C 807). As an expert, he testified that Tripelennamine is not and never has been a controlled substance, but is handled like any other legend drug. (R. C 889). He confirmed that "T's and Blues" is a combination of Talwin and Tripelennamine. (Tr. C 882,

C887). In the opinion of Dr. Morris, the petitioners acted in good faith, even though they kept no records on the disposition of the unaccounted for Tripelennamine tablets. (Tr. C 293)

Testimony concerning dispensation of controlled substances:

Stanley Kales testified that he did dispense controlled substances as charged, but in his professional judgment as a pharmacist, he filled and refilled the prescriptions for those substances lawfully and in good faith. He charged fair, usual and customary prices for the medication. (R. C 761). He also believed that the physician who prescribed and issued each prescription had done so lawfully and in good faith for the patient's medical condition, and not for treatment of a dependence on a controlled substance by the patient. (R. C 758-759). He also believed that prescriptions and refills prescribed after talking by telephone with the prescribing doctors were in good faith. (R. C 759). Customers who obtained the prescriptions, in his judgment, acted in good faith for legitimate medicinal

purposes and not for addiction. (R. C 759).

In one instance, however, in the case of a customer named Richard Gaston (whom Kales had known for 4 or 5 years (R. C 226)), Kales had filled and refilled several prescriptions for Ambenyl and Dimetane D.C., a controlled substance. On each occasion, Kales refilled the prescriptions only after calling the prescribing physician, but Kales had not realized that the two drugs were being refilled close together. (R. C 367-C 386).

Dr. Jagdish Shah, a witness for the Department, stated that a prescription written for Gaston was not written by him and that he had not been telephoned by the pharmacy for verification of the prescription. (R. C 278-279). Dr. Shah had, however, prescribed medication for Gaston. (R. C 281-282). Kales testified that he recognized Dr. Shah's name on the prescription in question, but not the signature. On previous occasions Kales had telephoned Shah's office to verify the prescriptions written by Shah.

The Drug Compliance Coordinator for the Department testified that in his opinion the controlled substance prescriptions had not been filled or refilled by petitioners in good faith. (R. C 134-135). In some instances the prescriptions had been refilled before the date that the original prescription would reasonably have been consumed according to directions for usage given by the doctor. (R. C 135-137). The Coordinator also noted that some of the prescriptions had been refilled although no refill instructions were written in the doctor's handwriting on the face of the prescription. The Coordinator also testified that he would have refused refills even if the doctor had given telephone authorizations for refilling. (R. C 145, 146).

Dr. Morris, expressed his opinion that the controlled substance prescriptions in question had been filled by Kales in good faith, to alleviate coughs and/or pain. (R. C 832-824). Dr. Morris stated that the only way the dispensing pharmacist would know whether or not the patient had a drug dependency or overdose problem would be to ask the doctor. If the

physician had no such suspicion, the pharamacist was perfectly free to fill or refill. (R. C 853). If the pharmacist does nto like the physician's answer, the pharmacist can refuse to fill the prescription. But if the physician verifies the prescription as being for a legitimate therapeutic application, the pharmacist is authorized to fill it. (R. C 853, 854-855, 857).

With reference to those patients who may have received medication too often on the refills, Dr. Morris noted that while the use may have been in excess of the prescribed rate, it was still within the range of usage set forth in the Physician's Desk Reference. (R. C 863). Dr. Morris also noted that some patients are notoriously careless in consuming cough preparations. (R. C 863). He explained that everyone misuses cough preparations containing Codeine, which are classified as controlled substance preparations. Both Ambenyl and Dimetane contain Codeine. (R. C 864). Both the Department and Dr. Morris agreed that there was nothing in the Physician's Desk Reference indicating that either Ambenyl or Dimetane is subject to abuse. (R. C 155-156;-

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819-820).

Dr. Morris expressed his opinion that the prescriptions filled by petitioners were filled in good faith. (R. C 824). He stated:

> I see no evidence at all in any of these records that there was a pattern which would indicate that there was a dependency developing or an ... addiction already present. (R. C 928).

A registered Illinois pharmacist since 1930 testifying on Petitioner's behalf, stated:

> As far as I can see, [these prescriptions and refills] were issued and dispensed in good faith [for the treatment of cough or pain]. (R. C 939-940).

The decisions below:

The State Board of Pharmacy found that Petitioners were guilty of "gross immorality" and recommended revocation of their licenses. The Department adopted the finds and recommendations and revoked Petitioners' pharmacy licenses.

On administrative review the Circuit Court of Cook County confirmed the findings and decision of the Department, although expressing

doubts as to the constitutionality of the loose standard of "gross immorality" invoked by the Department. Ultimately, however, the circuit judge denied the pharmacists' Petition for Rehearing.

On appeal the Appellate Court of Illinois affirmed the order revoking the pharmacy license. Addressing the issue of the constitutionality of the "gross immorality" test, the appellate court cited two prior cases as allegedly having ruled on a similar issue. Betts v. Department of Registration and Education (1981), 103 Ill. App. 3d 654, 431 N.E. 2d 1112 and Chestek v. Anderson (1981), 83 Ill. 2d 502, 460 N.E. 2d 247 (App. I, p. 8).

As hereafter argued, neither of the cases cited by the Illinois Appellate Court is apposite to the issues raised in the instant case and are readily distinguished.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND PRESERVED

As above noted, at the earliest opportunity, in the Circuit Court of Cook County on admini-

strative review Petitioners challenged the constitutionality of the "gross immorality" standard contained in the Illinois Pharmacy Practice Act and the Rules and Regulations promulgated by the Illinois agency charged with administration of the Pharmacy Act.

On appeal to the Illinois Appellate Court the issue was again addressed and argued, unsuccessfully.

A timely PETITION FOR LEAVE TO APPEAL to the Supreme Court of Illinois pointed out the inapplicability of the Appellate Court's cited cases of Betts and Chestek, supra and infra. The Supreme Court, however, refused to grant leave to appeal. (App. II).

A R G U M E N T

I.

THE ORDER REVOKING PETITIONERS' PHARMACY LICENSES SHOULD BE REVERSED WHERE THE REVOCATION IS BASED ON ALLEGED VIOLATIONS OF AN UNCONSTITUTIONAL STATUTE.

A. The phrase "gross immorality" is unconstitutional because it is vague, indefinite and incomplete; and its enforcement by Respondent subjected the licensees to arbitrary and capricious treatment.

It is now fairly established that holders of a license issued by a State agency have a "property interest" which is accorded due process recognition under the "life, liberty or property" provision of the Fourteenth Amendment. The State which grants such property interest may not arbitrarily or capriciously deprive the licensees of their property interest. In Dixon v. Love (1977), 431 U.S. 105, the court said at p. :

> Suspension [revocation] of issued licenses thus involved the state's action that adjudicates important interests of the licensee. In such cases, the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment (citing Bell v. Berson (1971) 402 U.S. 539).

Petitioners submit that the concept of "gross immorality" as the basis for license discipline, as provided in the instant statute and administrative regulations is unconstitutional because it is amorphous as "shifting sand". It is bedrock constitutional law that a statute or administrative regulation which is vague, indefinite and uncertain offends due process.

In Baggett v. Bullitt, (1964), 377 U.S.

360, this Court ruled (p. 367):

> [A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. (citing Connally v. General Construction Co., 269 U.S. 385; Lanzetta v. New Jersey, 306 U.S. 451; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495; United States v. Cardiff, 344 U.S. 174; Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210).

This Court has also firmly established that "a State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the cue process or equal protection clause of the Fourteenth Amendment." (Schware v. Board of Bar Examiners (1957), 353 U.S. 232, 238-239).

Moreover, in Giaccio v. State of Pennsylvania (1966), 382 U.S. 402, the court said (p. 402-3):

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide *without any legally fixed standards,* what is prohibited and what is not in each particular case. (citing Lanzetta v. State of New Jersey, supra; Baggett v. Bullitt, supra.).

And, in language exactly pertinent to the instant "gross immorality" standard of the Illi-

nois statute and administrative rules , this Court in Champlin Refining Co. v. Corporation Commission of Oklahoma, (1932), 286 U.S. 210 held (p. 243):

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> . . .
>
> It is not the penalty itself that is invalid, but *the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.* [citations] (Emphasis added).

The Supreme Court of Illinois, on numerous occasions likewise has enunciated similar constitutional sentiments. Viz. Krebs v. Thompson (1944), 387 Ill. 471, 477, 481-83 and Vallat v. Radium Dial Co. (1935), 361 Ill. 307.

Notwithstanding the Appellate Court's citation of a Supreme Court of Illinois decision in Chestek v. Anderson (1981), 83 Ill. 2d 502 [discussed post], the fact remains that the highest

court of the State of Illinois has avoided addressing the constitutional validity of the phrase "gross immorality" in the statute here involved. In Miller v. Department of Education and Registration (1979), 75 Ill. 2d 76, the Illinois Supreme Court came close to doing so because that issue was raised in an appeal from a ruling by a Cook County Circuit Court which had struck down the phrase "gross immorality" as unconstitutionally vague and arbitrary. The Supreme Court, however, decided the case on other grounds. Nevertheless, the observations of the nisi prius judge, coping with the phrase "gross immorality" are highly pertinent to the case at bar:

> What is gross immorality? Is it defined in reference to professional standards? The rules say it is measured by the standards of the Board of Pharmacy. But what are those standards? Do those standards relate to professional conduct? Do those standards define gross immorality relating to private conduct? Do they relate to references of sexual behavior? Do they relate to matters of domestic law or family matters? Does immorality relate to our conduct in commercial matters? Does gross immorality have meaning or reference in this area of human and civil rights?
>
> It would seem to me that this is in the words of [People ex rel Duffy v. Hurley, 402 Ill. at p. 562] is the kind of a statute that men

'of ordinary intelligence must necessarily guess as to their meaning' and that their opinions would probably differ.

This kind of standard *is no standard at all. This kind of standard is like a rose. It's in the eye of the beholder.* Counsel informs me that the history of the Act and his involvement in its preparation [Mr. Samuel Shkolnik, counsel in the case at bar] that this language comes to the Act on the waves of a 1955 amendment. I believe it can be stated that the morality of the community 22 years later is not similar today to the morality that existed in 1955.

In my opinion, law cannot be based on that kind of shifting sand.

B. The enforcement of the Illinois statute, and the administrative rules promulgated pursuant to that law, insofar as it applies to the loose and vague standard of "gross immorality" for license revocation contravenes due process as protected by the Fourteenth Amendment.

If "gross immorality" is arbitrarily to be applied as a catch-all net to discipline licensees for *any* type of misconduct, no matter now innocuous, then singly the words "gross" and "immorality", and most certainly in combination, as used in the statute and rules, are totally devoid of their ordinary meaning and understandings by mankind.

Certainly conduct may be a breach of the law, yet fall far short of "gross immorality".

E.g., spitting on a public sidewalk may be a public offense and a statutory misdemeanor, but certainly does not constitute "gross immorality".

In the case at bar, Petitioners' failure to keep proper records relating to the disposition of Tripelennamine (a prescription but *harmless* drug) may have violated the Department's regulation, but to characterize that omission as "gross immorality" is itself *gross*. The manner in which the Illinois Department and its Pharmacy Board promiscuously may invoke the test of "gross immorality" to discipline licensees is not a reasonable and objective definition of what the Board "measures" as gross immorality violates elementary due process. Baggett v. Bullitt, supra; Giaccio v. State of Pennsylvania, supra.

Presently, the problem of drug abuse, especially of so-called "controlled substances" is a national and state interest of paramount concern. The means of controlling the problem should not sacrifice elementary due process and

constitutional guarantees in respect to property and liberty interests. The overly broad standard of "gross immorality" employed by the State of Illinois Pharmacy Board, without giving that standard an objective definition, renders the standard as impermissibly vague. Refusal by the highest court of Illinois to address this sensitive constitutional question therefore merits this Court's review.

C. The Illinois statute delegates legislative authority to an administrative agency with arbitrary powers to act with unguided and uncabined discretion to apply, or to withhold application of the law to licensees, as the Board sees fit.

Rule VII of the Rules and Regulations promulgated by the Illinois Department of Education and Registration for the administration of the Pharmacy Practice Act provides as follows:

> RULE VII -- Gross Immorality.
>
> The term 'gross immorality' under Section 7-6 of the Act means and includes any act or practice inimical to the public healty, safety and welfare *as measured by the standards of the Board of Pharmacy*, that is wilfully and knowingly committed or engaged in by the holders of a license or certificate of registration issued under the provisions of the Act. (Emphasis added).

Task of defining "gross immorality" is delegated by the Illinois Legislature to a State administrative body, i.e., the Department of Education and Registration. That body, in turn, delegated the task of defining "gross immorality" to the Board of Pharmacy. That Board, however, has not promulgated any guidelines as to what it "measures" to be acts or practices "inimical to the public health, safety and welfare" and apparently to do so on an *ad hoc* basis. It is settled under Illinois law, as declared in numerous cases, that:

> A law vesting discretionary power in an administrative officer without properly defining the terms under which his discretion is to be exercised, is void as an unlawful delegation of legislative power. Such a statutory provision will be deemed by the courts as unconstitutional. (Krol v. County of Will (1968) 38 Ill. 2d 587, 593, 233 N.E. 2d 417).

In the case at hand, assuming that the legislature properly delegated the Pharmacy Board to apply content to the phrase "gross immorality", the Board has failed to crystallize what it "measures" to be "gross immorality". As noted by the Court in Krebs v. Thompson, 387 Ill. 471, at p. 483:

> No one can determine, from reading the Act, the activities to which it is directed. The determination of those activities must await the opinion of ministerial officers to whom it is delegated by the Act... Until the committee acts [supply Pharmacy Board] no one may know what those requirements are. ... The law cannot rest in the opinion of ministerial officers.

In other contexts state courts have held loose standards of professional conduct unconstitutional. In Cherry v. Board of Regents of Univ. of State of N.Y., 289 N.Y. 148, 154 the New York court ruled the undefined phrase "unprofessional conduct" as unconstitutional. The court said:

> That term, the appellant argues, is so vague that the legislature in specifying that it may constitute sufficient ground for revocation or a suspension of a license to practice, has in effect delegated to the Board of Regents unfettered discretion to determine what shall be sufficient cause for disqualification of a dentist. The legislature, of course, could not grant to an administrative board or quasi-judicial tribunal, power to impose such a penalty upon a dentist for *an act or conduct not defined in advance*. That would be contrary to our basic concepts of justice, Nor could it delegate to the Board of Regents legislative power defined, in accordance with unfettered discretion, the acts or conduct which, *in the opinion of the Board*, would justify disciplinary action against the dentist. (Emphasis added).

In Sage-Allen Co., Inc. v. Wheeler, 119 Conn. 667, 179 A. 195, 98 ALR 197, the court

construed the words "immoral", "fraudulent", "dishonorable" and "unprofessional" contained in a statute regulating the profession of optometry the Connecticut Court said:

> Giving these words a broad meaning, it would be difficult to justify the grant to the Board of power to revoke a license for any conduct 'which it might deem to be immoral, dishonorable or unprofessional'. (119 Conn. at 678-9, 179 A. at 199) (Emphasis added).

In a similar vein, in Pennsylvania State Board of Pharmacy v. Cohen (1972), 448 Pa. 182, 292 A. 2d 277, the court, construing a statute providing for suspension of a pharmacist's license for "grossly unprofessional conduct" declared (p. 283):

> State Board of Pharmacy statutory duty to regulate the practice of pharmacy *does not give it the power on a case by case basis to make ongoing evaluation of what constitutes unprofessional conduct;* rather, such determinations may only be made by statute or rule and exercised by the Board's power on a case by case basis not based on statute or the rule suffers from constitutional infirmities of vagueness. (Emphasis added).

In the case at bar the Pharmacy Board could not arbitrarily ascribe its own meaning to the statutory phrase "gross immorality" and then decide that Petitioners here had violated

the law as so construed by the Board. Even if certain legislative authority could properly be delegated to an administrative agency, that delegation cannot vest "uncabined discretion" to such agency even if "a generic language" is employed in the statute. (Stofer v. Motor Vehicle Casualty Co. (1977), 68 Ill. 2d 361, 369 N.E. 2d 875).

D. The constitutionality of the "gross immorality" test contained in the Illinois Pharmacy Practice Act has never been squarely addressed and decided by the highest court of Illinois.

In the case at bar the Illinois intermediate appellate court cites two cases as allegedly having ruled on the constitutionality of the "gross immorality" standard contained in the statute and rules of the Illinois Department of Registration and Education: Betts v. Department of Registration and Education (1981) 103 Ill. App. 3d 654, 431 N.E. 2d 1112 and Chestek v. Anderson, (1981) 83 Ill. 2d 502, 416 N.E. 2d 247 (App. I, p. 8).

Neither case cited by the appellate court is apposite to the issue raised in the instant

case for the following reasons:

(1) While it is true that in Betts the appellate court ruled that the phrase "gross immorality" was not unconstitutional, the Supreme Court of Illinois denied leave to appeal in that case, and therefore that court never passed upon the constitutionality of the language at issue.

(2) Betts is quite different on its facts. There the charges against plaintiffs included, inter-alia, their failure to account for approximately 1,500,000 tablets of Talwin and Pyribenzamine, both abused drugs and controlled substances. The parties in Betts also failed to account for Tripelennamine which, when combined with Talwin or Pyribenzamine produces "T's and Blues".

(3) Chestek was decided by the Illinois Supreme Court on a different standard contained in another statute, i.e., "unprofessional conduct" which can be measured by the ethical standards of the profession

involved.

(4) Chestek involved statutory regulation of dentists, not pharmacists. With respect to the "unprofessional conduct" standard there involved the court in Chestek said (p.507):

> Further, terms such as 'unprofessional conduct' are susceptible to common understanding by members of the profession.*

II.

RESPONDENT'S DETERMINATION THAT PETITIONERS' ACTIONS CONSTITUTED *"GROSS IMMORALITY"* IS PALPABLY ERRONEOUS WHERE THE DEPARTMENT FAILED TO ESTABLISH THAT PETITIONERS UNLAWFULLY DISPENSED A "LEGEND" BUT HARMLESS PRESCRIPTION DRUG, OR THAT THEY DISPENSED CONTROLLED SUBSTANCES INDISCRIMINATELY WITHOUT PROPER MEDICAL PRESCRIPTIONS.

A. Failure to provide proper documentation of the legend drug is not an omission so egregious as to amount to "gross immorality".

The only offense found by the Pharmacy

*/ If susceptibility "to common understanding by members of [a] profession" is the criterion, it is inconceivable that there could be any such "common understanding among pharmacists that petitioners' failure to observe a routine record-keeping requirement of a prescription drug, and the lone instance of filling an alleged "forged" prescription, constituted *"gross immorality"*, --especially where a nationally reknowned pharmacologist and two other pharmacists testified that in their professional judgment, the action of petitioners here did not constitute "gross immorality".

Board with respect to the disposition of Tripelennamine was that Petitioners failed to provide proper documentation for the missing tablets. The findings of fact show only that a quantity of these tablets were unaccounted for. There is no finding and no evidence to support a finding that Petitioners dispensed or otherwise disposed of Tripelennamine in an unlawful or unauthorized manner. Nothing in the record indicates what became of the supply of those tablets.

A conclusion that the mere failure to keep required records of Tripelennamine was "gross immorality" is a wholly unsupportable and hyperbolic construction of that phrase.

Tripelennamine is not and has never been considered a "controlled substance". It is handled like any other legend drug. (R. C 889). By itself it is not an abused drug. The possibility of abuse exists only when Tripelennemine is combined with certain controlled substances.

B. Respondent failed to prove that Petitioners' handling of the controlled substances amounted to "gross immorality".

The thrust of the Department's charges was two-fold: that the refills (and in some cases the prescriptions themselves) were not authorized by the physician purporting to have signed the prescription and that the refills were dispensed too often.

In one instance only, a prescription purportedly signed by Dr. Shah,did the Department establish that the prescription and the refills were not authorized by the doctor. But on this count there was sufficient conflicting evidence to the effect that Petitioner Kales believed someone to be Dr. Shah gave him telephonic approval for the filling and refilling.

The uncontradicted and uncontroverted testimony of Dr. Morris, a pre-emimently qualified expert in pharmacology, established that although the prescriptions may have been duplicated, or refilled more often than required by the prescription dosage, the actual amounts dispensed were not in excess of the standards set

by the Physician's Desk Reference. Absolutely nothing in the record indicates that the amounts of the controlled substances dispensed were of such proportions as to indicate that the patients were dependent upon or abusing those drugs.

Far from satisfying the standard of "gross immorality" the evidence actually showed without contradiction that Petitioners acted in good faith in dispensing the controlled substances involved.

C O N C L U S I O N

Wherefore Petitioners respectfully pray that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

Appendix I -- Decision of the Appellate Court of Illinois

Appendix II-- Order of Supreme Court of Illinois denying petition for leave to appeal.

Appendix III- Order of Supreme Court staying mandate pending application for certiorari to the United States Supreme Court.

84-3089

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAWNDALE MEDICAL SUPPLY INC., and STANLEY KALES, Plaintiffs-Appellants, -vs- DEPARTMENT OF REGISTRATION AND EDUCATION, Defendant-Appellee.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE JAMES C. MURRAY, JUDGE PRESIDING

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Plaintiffs, Lawndale Medical Supply Inc. (Lawndale) and Stanley Kales, Lawndale's pharmacist and owner, appeal from an order of the circuit court of Cook County affirming the findings of the defendant, Department of Registration and Education (Department), and its revocation of plaintiffs' registration licenses and Lawndale's controlled substances license. Plaintiffs also appeal from a subsequent order denying their motion for reconsideration. The issues presented for review are: (1) whether the Pharmacy Prac-

84-3089

IN THE APPELLATE COURT OF ILLINOIS
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Plaintiffs-Appellants,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
-vs-	)	
DEPARTMENT OF REGISTRATION AND EDUCATION,	)	HONORABLE JAMES C. MURRAY, JUDGE PRESIDING
Defendant-Appellee.	)	

ORDER DISPOSING OF APPEAL
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tice Act, Ill. Rev. Stat. 1979, ch. 111, par. 4001 et seq., is unconstitutional; (2) whether the defendant's findings were arbitrary and capricious and against the manifest weight of the evidence and (3) whether the Department's proceedings, rulings and imposition of the sanction of revocation were arbitrary and capricious.

On July 29, 1982, defendant filed identical complaints against each plaintiff, seeking suspension or revocation of their respective certificates of registration. The complaints charge essentially two courses of conduct violative of the Pharmacy Practice Act and the Illinois Controlled Substances Act, Ill. Rev. Stat. 1979, ch. 56½, par. 1100 et seq.: the failure to account for the disposition of 295,000 tablets of a legend drug, Tripelennamine -50, and the indiscriminate dispensation of the schedule V controlled substances Dimetane, D.C., Ambenyl, Tylenol with Codeine, and Hycodan. Formal hearings before the Board of Pharmacy (the Board) began December 7, 1982.

The following testimony was adduced at the hearings: Fred Bondy, Jerome Pauker and Julius Sarnat, officers of three drug wholesalers in the Chicago area, authenticated invoices from their companies showing the acquisition by Lawndale of 296,000 tablets of Tripelennamine-50 between September 1979 and September 1980. Irvin Tchon, pharmacy investigator for the Department, conducted an accountability audit for that period. He testified that plaintiffs were credited for the disposition of 1,000 tablets of the Tripelennamine-50. Stanley Kales made a claim of constitutional privilege under the Fifth Amendment and refused to answer any questions relating to Tripelennamine-50. Plaintiffs' attorney conceded that there existed no records of disposition, by prescription or any other manner, for the Tripelennamine-50.

Lawrence Slotnik, drug compliance coordinator for the Department, testified that Tripelennamine-50 is a legend drug which cannot be dispensed without a bona fide prescription. He stated that Tripelennamine-50 has become an

abused drug because, when taken in combination with Talwin or Pentazocine, it produces a heroin-like effect. Slotnik offered his opinion that the annual usage rate of legitimate purposes of Tripelennamine-50 for a pharmacy of Lawndale's size and location would be small. Slotnik further stated that in his opinion, the 295,000 pills for which there existed no records of disposition could not have been dispensed for legitimate medical uses. Dr. Ralph Morris, professor of pharmacology at the University of Illinois, testified that in his opinion, the pharmacist was acting in good faith notwithstanding the lack of disposition records.

The Department also introduced into evidence prescriptions dispensed by the plaintiffs for Schedule V controlled substances, namely different cough preparations containing codeine and Tylenol with Codeine. Department exhibits 7 through 10 consist of summary charts for prescriptions filled and refilled for four of plaintiffs' customers. The charts show that, for each customer, four or five different pre-

scriptions were filled and then refilled almost weekly during the spring and summer of 1980. The prescriptions often overlapped and were sometimes dispensed simultaneously or within intervals of as short as one or two days. Between June 1980 and September 1980, two of plaintiffs' customers each purchased 24 four-ounce bottles of cough syrup containing codeine. One of those customers also purchased five eight-ounce bottles of Tylenol with Codeine during the same time period.

The actual prescriptions also were introduced into evidence. Noted on the back of each were the dates of illing and refilling accompanied by Kales' signature. Kales admitted that no refills were authorized by the prescriber on the face of the prescriptions but stated that it was his routine practice to call the physician for authorization. He stated that he had received telephone authorization for each of the prescriptions and refills in question. Kales further testified that he was the only dispensing pharmacist at Lawndale and that he had no patient profile or computerized system to check prescrip-

tions. He stated that he had known the customers whose prescriptions were introduced into evidence for at least five years and recognized them when they came into the pharmacy.

The essency of Kales' testimony regarding the subject prescriptions was that he believed they were legitimate prescriptions, that he personally had heard the patients cough and that he dispensed the cough medication in good faith after receiving telephone authorization from the prescriber in each instance. Kales indicated that he believed his responsibility in refilling a prescription for cough medication lay primarily in obtaining the doctor's authorization and in determining for himself that the patient still had a cough.

Dr. Jagdish Shah was shown a prescription for Hycodan for which Kales stated he had obtained authorization from Dr. Shah. Dr. Shah testified that the person to whom the prescription was issued was his patient but denied writing, issuing or signing it. He further denied that he had ever been called for authorization to refill the

prescription.

Lawrence Slotnik also examined the prescriptions filled by Kales. He testified that in his opinion they could not have been filled in good faith because, in many cases, they had been filled and refilled not in accordance with the frequency indicated on the prescription. He noted that the refills were dovetailing with refills of similar prescriptions which, to him, would indicate an abuse. He also stated that the dispensation of large quantities of cough medications during the summer months was unusual. Slotnik further noted that there was no authorization for refills on any of the prescriptions but that they were refilled anyway. He stated that even with telephone authorization from the prescriber, he would not have filled and refilled the subject prescriptions because, in his opinion, the pharmacist has a responsibility to make an independent determination no matter what the doctor says. He conceded that nothing in the statutes requires the maintenance of patient profiles or computerized prescription systems.

Dr. Morris testified that, in his opinion, the subject prescriptions were filled and refilled in good faith. He indicated that while a pharmacist has the right not to refill a prescription, if a patient has a valid prescription and the pharmacist gets authorization from the prescriber, that is sufficient to meet the statutory good faith requirements. Dr. Morris further noted that patients often do not pay attention to dosage instructions for cough medications and found nothing problematic with more than one prescription for the same kind of medication.

Phillip Ritzlin, a retired pharmacist also testified that in his opinion, the prescriptions were filled and refilled in good faith. He was, however, unsure whether his conclusion was based on testimony he had heard from others at the hearing that a physician was called for authorization for each refill.

On May 3, 1983, the Board issued its findings of fact, conclusions of law and recommendations to the director of the Department. It found that between September 1979 and September 1980,

plaintiffs received at least 296,000 tablets of Tripelennamine-50, plaintiffs had a duty to account for their disposition, and they failed to so account for 295,000 tablets. The Board also found that plaintiffs admitted dispensing the controlled substances listed in the complaint, and found that such dispensing was done in an "indiscriminate manner." The Board's conclusions of law were that the failure to account for the Tripelennamine-50 constituted gross immorality under the Pharmacy Practice Act, and that the dispensation of the controlled substances was not done in good faith in violation of the Controlled Substances Act, constituting gross immorality and violating the Rules and Regulations promulgated under the Pharmach Practice Act. The Board recommended revocation of plaintiffs' certificates of registration. On June 20, 1983, the director of the Department revoked Lawndale's license for the practice of pharmacy, revoked Lawndale's controlled substance license, and revoked Kales' license for the practice of pharmacy. On July 6, 1983, plain-

tiffs filed a complaint seeking administrative review of the Department's action. The circuit court of Cook County affirmed the decision of the Department and denied plaintiffs' motion for reconsideration. Plaintiffs appeal.

Plaintiffs' first contention on appeal is that section 7.6 of the Pharmacy Practice Act, which permits the revocation by the Department of:

> "***any license or certificate of registration issued under the provisions of this Act or of any prior Act of this state *** when *** the *** holder of such license or certificate *** is found to be guilty of gross immorality, *** or is found to have wilfully violated any of the rules and regulations promulgated for the administration of this Act ***".

(Ill. Rev. Stat. 1979, ch. 111, par. 4019), is unconstitutionally vague and constitutes an impermissible delegation of legislative power to an administrative agency. Both of plaintiffs' arguments in this regard relate to the alleged vague-

ness of the term "gross immorality" and therefore must fail becuase, as plaintiffs concede, this court has previously held that "gross immorality" as used in the Pharmacy Practice Act is not unconstitutionally vague. (Betts v. Department of Registration & Education (1981), 103 Ill. App. 3d 654, 431 N.E. 2d 1112; see also Chastek v. Anderson (1981), 83 Ill. 2d 502, 416 N.E. 2d 247). In Chastek, the supreme court noted that it is impossible to categorize all the acts constituting a terms such as "gross immorality" which is, in any event, susceptible to common understanding by members of the profession. Further, the Betts court stated that the term "gross immorality" must be read in conjunction with the applicable statute and administrative rules and regulations governing the practice of pharmacy. (103 Ill. App. 3d 654, 664-65, 431 N.E. 2d 1112, 1119-20.) The court specifically noted that Rule VII of the Rules and Regulations Promulgated for the Administration of the Illinois Pharmacy Act (1978) defines "gross immorality" as "any act or practice which is inimical to the

public health, safety or welfare as measured by the standards of the Board of Pharmacy, that is wilfully and knowingly committed or engaged in by the holder of a license *** issued under the provisions of the Act."

Plaintiffs maintain, however, that the Board is impermissibly empowered to arbitrarily determine what conduct is proscribed as grossly immoral. They point to the language, "as measured by the standards of the Board of Pharmacy," as evidence of the impermissible delegation of legislative power they find objectionable.

We disagree. The legislature, having declared its policy and purpose and provided standards for the exercise of power, may confer upon administrative authorities the power to enact rules to promote the purpose and spirit of the legislation and to carry it into effect. Further, even though such rules are given the force and effect of law, there is no violation of the constitutional inhibition against the delegation of legislative function. (People ex rel. Mosco v. Service Recognition Board (1949), 403 Ill. 442, 86 N.E. 2d 357.) Moreover, the preciseness

of the standards that must be set by the legislature depends on the complexity of the subject matter and ultimate objective of the act in question; where the technical complexity, diversity of problems and degree of detail involved in setting specifications for standards can be better resolved by an administrative body than by the legislature itself, those specifications for standards need not be articulated by the legislature. Alexander v. Director, Department of Agriculture (1983), 111 Ill. App. 3d 927, 444 N.E. 2d 811.

To avoid characterization as an unconstitutional delegation of its power, the legislature must have provided sufficient identification of: (1) the persons and activities potentially subject to regulation; (2) the harm sought to be prevented and (3) the means intended to be available to the administrator to prevent the identified harm. (Stofer v. Motor Vehicle Casualty Co. (1977), 68 Ill. 2d 361, 369 N.E. 2d 875.) Plaintiffs' argument is directed to the second of the Stofer categories, the harm sought to be pre-

vented. The Stofer court elaborated:

> "With regard to identifying the harm sought to be prevented, the legislature may use somewhat broader, more generic language. *** It is sufficient if, from the language of the statute, it is apparent what types of evil the statute is intended to prevent." 68 Ill. 2d 361, 373, 369 N.E. 2d 875, 879.

This returns us to the Betts court's determination that "gross immorality" is not an unconstitutionally vague term because the Act places pharmaists on notice that their pharmacy licenses may be revoked for engaging in conduct that is grossly immoral and inimical to the health, safety and welfare of the general public. The Betts court noted that our supreme court in Chastek and Miller v. Department of Registration & Education (1979), 75 Ill. 2d 76, 387 N.E. 2d 300, discussed in detail what type of conduct is considered grossly immoral and further stated that the guidance and scope provided by those cases is sufficient to determine on a case-by-case basis

whether conduct is grossly immoral. (103 Ill. App. 3d 654, 665, 431 N.E. 2d 1112, 1120.) We therefore reject plaintiffs' constitutional challenges.

Plaintiffs next contend that the findings of the Board are against the manifest weight of the evidence and are arbitrary and capricious. The findings and conclusions of an administrative agency on questions of act are prima facie true and correct (Ill. Rev. Stat. 1981, ch. 110, par. 3-110), which means that courts may not interfere with the discretionary authority vested in administrative bodies unless that authority is exercised in an arbitrary or capricious manner or the administrative decision is against the manifest weight of the evidence. (Murdy v. Edgar (1984), 103 Ill. 2d 384, 469 N.E. 2d 1085; Cotovsky v. Department of Registration & Education (1982), 110 Ill. App. 3d 417, 442 N.E. 2d 520.) The purpose of administrative review is to make certain the agency has acted within the judicial bounds defined by law, to guard the statutory and constitutional rights guaranteed

to one subject to administrative action and to ascertain whether the record supports the order issued. (Edwards v. City of Quincy (1984), 124 Ill. App. 3d 1004, 464 N.E. 2d 1125.) A reviewing court will neither substitute its judgment for that of the administrative agency nor overturn administrative findings unless they are without substantial foundation in the record. (Irving's Pharmacy v. Department of Registration & Education (1979), 75 Ill. App. 3d 652, 394 N.E. 2d 627.) In order for a court of review to find that an agency's decision is against the manifest weight of the evidence so as to justify substituting its judgment for the discretion of the board, the court must be able to conclude that all reasonable and unbiased persons, acting within the limits prescribed by law and drawing all inferences in support of the findings, would agree that it is erroneous and that the opposite conclusion is clearly evidence. O'Boyle v. Personnel Board of the City of Chicago (1983), 119 Ill. App. 3d 648, 456 N.E. 2d 998.

Our review of the record in the instant case mandates no such conclusion. As noted above, evidence was presented that overlapping prescriptions were filled and refilled, often within a very few days by a pharmacist who testified that he knew and recognized the patients for whom he was dispensing the prescriptions. No refills were authorized on the face of the prescriptions and there was conflicting testimony regarding Kales' receipt of telephone authorization from the prescribers. Conflicting testimony also was received as to whether Kales acted in good faith in dispensing the subject prescriptions. Plaintiffs' interpretation of the conflicts in testimony to mean that the Board's findings were against the manifest weight of the evidence is without merit. It is particularly within the province of an administrative agency to resolve any factual conflict presented by the evidence and to determine the credibility of witnesses. Fagiano v. Police Board of the City of Chicago (1984), 123 Ill. App. 3d 963, 463 N.E. 2d 845; see also Gregory v. Bernardi (1984), 125 Ill.

App. 3d 376, 465 N.E. 2d 1052.

Plaintiffs further maintain that there is no support in the record for the Board's finding that the failure to account for the 295,000 tablets of Tripelennamine-50 constituted gross immorality because no evidence was presented about the disposition of the tablets. It was , however, uncontested that there existed no disposition records for the subject drugs, and there was conflicting testimony presented as to whether the failure to account for the drugs demonstrated good faith. Plaintiffs' attempt to use the invocation of his privilege against self-incrimination as the basis for his argument that no evidence was received about the disposition of the Tripelennamine-50 is specious. The constitutional guarantee against self-incrimination protects a witness from being forced to give testimony leading to the imposition of criminal penalties but does not insulate a witness from every possible detriment resulting from his testimony; his silence, along with other evidence, may be used to support an adverse decision by a disci-

plinary board. (Giampa v. Illinois Civil Service Commission (1980), 89 Ill. App. 3d 606, 411 N.E. 2d 1110.) We thus conclude that the Board's findings and conclusions were amply supported by the evidence and wholly reasonable.

Plaintiffs' final contention is that the revocation of their licenses must be reversed where the Department's actions and the order of revocation were arbitrary and capricious. In particular, plaintiffs argue that they were prejudiced by the interval of almost two years between the acountability audit and the filing of the complaint against them. Plaintiffs also claim they were prejudiced by Edward Bruno's participation at the hearing as an advisor to the Board because, as chief of prosecutions for the Department, he had signed the complaint against them. Plaintiffs also submit that the sanction of revocation was arbitrarily harsh.

A reviewing court has a duty to examine the procedural methods used at an administrative hearing to insure that a fair and impartial procedure was used. (Middleton v. Clayton (1984),

128 Ill. App. 3d 623, 470 N.E. 2d 1271.) We note initially that plaintiffs raised no objection at the hearing to the allegedly prejudicial delay. Plaintiffs also acquiesced in Bruno's participation in the proceedings, at which he fully explained his advisory position for the record. The failure to object waives the issue on appeal. (Odell v. Village of Hoffman Estates (1982), 110 Ill. App. 3d 974, 443 N.E. 2d 247.) Plaintiffs maintain that investigator Tchon's recollection of the accountability audit was too vague after almost two years to support his testimony. We agree, however, with the defendant that Tchon sufficiently authenticated the accountability audit which establishes that the 295,000 tablets of Tripelennamine-50 could not be accounted for at the time of the audit. The plaintiffs provide absolutely no aupport for their allegations of rpejudice from Bruno's participation in the hearing. We therefore agree with the trial court that there is no indication in the record of any prejudice to the plaintiffs from the complained-of procedural deficiencies.

Finally, plaintiffs argue that the sanction of revocation is arbitrarily harsh. It is established that if an administrative agency's determination is not arbitrary or unreasonable and does not involve the imposition of discipline unrelated to the needs of the service, it will stand even where the court considers another sanction more appropriate. (Kloss v. Board of Fire & Police Commissioners of the Village of Mundelein (1983), 96 Ill. 2d 252, 449 N.E. 2d 845; see also Feliciano v. Illinois Racing Board (1982), 110 Ill. App. 3d 997, 443 N.E. 2d 261.) We do not believe that statutorily authorized license revocation is too harsh a penalty for conduct which the Board found inimical to the health, safety and welfare of the public and which relates directly to plaintiffs' fitness to practice pharmacy. The evidence presented at the hearing amply supports the sanction of revocation. We therefore affirm the order of the trial court affirming the Board's findings of fact and conclusions of law and its revocation of plaintiffs' licenses.

For the foregoing reasons, the order of the circuit court of Cook County is affirmed.

Affirmed.

RIZZI, P.J., McNAMARA and McGILLICUDDY,JJ.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 2, 1986

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No. 63876 - Lawndale Medical Supply Inc., et al. petitioners, v. Department of Registration and Education, respondent. Leave to appeal, Appellate Court, First District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1986.

No. 63875

IN THE

SUPREME COURT OF ILLINOIS

Lawndale Medical Supply, Inc., and Stanley Kales,	)
Petitioners	)
v.	)
Department of Registration and Education,	)
Respondent	)

ORDER

This matter has come for consideration upo the motion of petitioners to stay the mandate of this Court pending appeal or application for certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application fo certiorari or the expiration of the period within which said application or notice may be filed. I certiorari is applied for or notice of appeal filed, the mandate of this Court shall, upon proo of such filing being made by affidavit filed with the clerk of this Court, be further stayed pend-

ing resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or certiorari may be sought.

/s/ Seymour Simon
Justice, Supreme Court
of Illinois

FILED
October 14, 1986
CHICAGO
SUPREME COURT CLERK